Mascom (M) Sdn Bhd & Ors v Ken Grouting System Specialist Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO S–02–807 OF 1998
ABDUL KADIR SULAIMAN, MOKHTAR SIDIN AND PS GILL JJCA
19 SEPTEMBER 2003

Arbitration — Arbitrator — Appointment — Settlement agreement — Time fixed in agreement — Lapse of time — Application to extend time — Whether undue hardship caused if extension of time not allowed — Arbitration Act 1952 s 28

The appellants were awarded, a project by the Government of Malaysia. Pursuant to a joint-venture agreement, the respondent and the appellants agreed to carry out and complete the said project on the terms specified in the said agreement. The respondent was responsible for financing the execution and implementation of the said project. Differences, however, arose between the appellants and the respondent culminating in termination notices issued, by the appellants to the respondent. Both parties then decided to negotiate on their differences and find a common ground. This resulted in a settlement agreement being drafted by both the parties. Essentially, by the terms of the settlement agreement, the appellants agreed to repay the respondent actual expenses as proved and substantiated plus reimbursement of actual expenses on specific items. Clause 10 of the settlement agreement allowed for a quantity surveyor to be nominated by the President of the Institute of Quantity Surveyors to settle any disputed expenses. When disputes arose once again between the appellants and respondent in respect of certain expenses incurred by the respondent, the respondent wrote to the President, of the Institute of Quantity Surveyors at the request of the appellants for the appointment of an independent quantity surveyor. The appellants' solicitors disagreed with the appointment as the said surveyors were not appointed by the President of the Institute of Quantity Surveyors, as per cl 10 of the settlement agreement, but was instead nominated by the Chairman of the Quantity Surveyor Sectional Committee. The respondent then wrote directly to the President of the Institute of Surveyors, requesting his assistance in the appointment of a quantity surveyor. An independent consulting quantity surveyor was then nominated on 10 January 1998. A lull took place thereafter, in terms of correspondence between the parties, and matters were only reactivated on 13 June 1998, when the solicitors for the respondent wrote to inform the appellants of the appointment of Mr Hoe Peng Khoon as the independent consultant quantity surveyor, together with the stated fees and holding costs. On 3 July 1998, the appellants replied through their solicitors, disputing the claims of the respondent and informing them that they were prepared to accept court process. It is patently clear from the chronology of events and dates that the respondent was in default of the stipulation of time in respect of the said settlement agreement, particularly cll 10 and 16. Mindful of this lapse in respect of cl 10 particularly, the respondent then filed the present application for extension of time pursuant to s 28 of the Arbitration Act 1952. The extension of time was allowed by the learned trial judge. An appeal was lodged against the said decision of the trial judge.

Held, dismissing the appeal:

(1) The High Court judge was correct in his interpretation of s 28 of the Arbitration Act 1952, that the High Court is given a discretion to extend the time which has expired depending on whether in the circumstances of any particular case undue hardship would be caused if the extension is not given (see para 20).

(2) If the appellants had taken umbrage on the appointment of the said independent quantity surveyor, they should have taken expeditious steps to notify the respondent about the erroneous appointment. To take a supine position for 24 days, and then to insist on strict adherence of the time limit, imposed in cl 10, was unjust. Although the appellants were not required to bring to the attention of the respondent the erroneous appointment, however, they did so eventually, some 24 days later after receipt of the notification. The appellants cannot approbate and reprobate, in this manner. To that end, the late response of the appellants to the erroneous appointment, did contribute to the initial delay (see paras 26–27).

(3) The delay on the part of the respondent in making the application for extension of time was only one of the factors that needed to be considered. There was the added dimension of undue hardship, that one must consider, which means greater hardship than the circumstances warrant, or hardship greater than that which injustice, the applicant should be called upon to bear. The delay of seven months in filing the application for extension and any incidence of prejudice suffered by the appellants was far outweighed by the undue hardship that the respondent would suffer if the application for extension of time was not granted. By barring the respondent's claim, it would effectively, absolve the appellants of any liability, and would cause the respondent undue hardship (see paras 35, 37).

[**Bahasa Malaysia summary**

Perayu-perayu telah diawardkan satu projek oleh Kerajaan Malaysia. Menurut satu perjanjian usahasama, responden dan perayu-perayu telah bersetuju untuk melaksana dan menyiapkan projek tersebut berdasarkan terma-terma yang ditetapkan dalam perjanjian tersebut. Responden adalah bertanggungjawab untuk membiayai penyempurnaan dan pelaksanaan projek tersebut. Perbezaan, bagaimanapun, telah timbul antara perayu-perayu dan responden sehingga mengakibatkan notis-notis penamatan dikeluarkan, oleh perayu-perayu kepada responden. Kedua-dua pihak kemudian memutuskan untuk berunding tentang perbezaan mereka dan mencapai satu penyelesaian. Ini menyebabkan satu perjanjian penyelesaian didrafkan oleh kedua-dua pihak. Pada dasarnya, melalui terma-terma perjanjian penyelesaian, perayu-perayu telah bersetuju untuk membayar balik responden perbelanjaan sebenar yang dibuktikan dan diperkukuhkan dengan pembayaran semula perbelanjaan sebenar ke atas butir-butir tertentu. Klausa 10 perjanjian penyelesaian membenarkan juruukur bahan dilantik oleh Presiden Institut Juruukur Bahan

untuk menyelesaikan apa-apa perbelanjaan yang dipertikaikan. Apabila pertikaian timbul sekali lagi antara perayu-perayu dan responden berkaitan perbelanjaan tertentu yang dikenakan oleh responden, responden telah menulis kepada Presiden Institut Juruukur Bahan atas permintaan perayu-perayu untuk perlantikan seorang juruukur bahan berasingan. Peguam perayu-perayu tidak bersetuju dengan perlantikan tersebut kerana juruukur tersebut tidak dilantik oleh Presiden Institut Juruukur Bahan, menurut kl 10 perjanjian penyelesaian, tetapi sebaliknya telah dilantik oleh Pengerusi Jawatankuasa Sektor Juruukur Bahan. Responden kemudian telah menulis terus kepada Presiden Institut Juruukur Bahan, memohon bantuan beliau dalam perlantikan seorang juruukur bahan. Seorang perunding juruukur bahan berasingan kemudiannya telah dilantik pada 10 Januari 1998. Keadaan terhenti seketika, berkaitan hubungan antara pihak-pihak, dan perkara tersebut hanya diambil tindakan pada 13 Jun 1998, apabila peguam bagi pihak responden menulis untuk memaklumkan kepada perayu-perayu tentang perlantikan En Hoe Peng Khoon sebagai perunding juruukur bahan berasingan, bersama dengan yuran dan kos pegangan yang dinyatakan. Pada 3 Julai 1998, perayu-perayu telah menjawab melalui peguam mereka, mempertikaikan tuntutan responden dan memaklumkan bahawa mereka bersedia untuk menerima proses mahkamah. Ia amat jelas berdasarkan kronologi kejadian dan tarikh-tarikh bahawa responden gagal dalam penetapan masa berkaitan perjanjian penyelesaian tersebut, terutamanya kll 10 dan 16. Dengan mengambilkira peluputan ini dalam kl 10 khususnya, responden kemudian telah memfailkan permohonan semasa untuk lanjutan masa menurut s 28 Akta Timbangtara 1952. Lanjutan masa tersebut telah dibenarkan oleh hakim perbicaraan yang bijaksana. Satu rayuan telah dibuat terhadap keputusan hakim perbicaraan tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Hakim Mahkamah Tinggi adalah betul dalam tafsiran beliau tentang s 28 Akta Timbangtara 1952, bahawa Mahkamah Tinggi diberikan budi bicara untuk melanjutkan masa yang telah luput bergantung kepada sama ada dalam keadaan kes tertentu kesukaran yang tidak sewajarnya akan diakibatkan jika lanjutan tidak diberikan (lihat perenggan 20).

(2) Sekiranya perayu-perayu tersinggung dengan perlantikan juruukur bahan berasingan, mereka telah mengambil langkah segera untuk memaklumkan responden tentang perlantikan yang salah tersebut. Untuk mengambil sikap yang mengalah sahaja untuk 24 hari, dan kemudian mendesak pematuhan ketat berhubung had masa, yang dikenakan dalam kl 10, adalah tidak adil. Walaupun perayu-perayu tidak dikehendaki memaklumkan responden tentang perlantikan yang salah tersebut, namun begitu, mereka akhirnya telah berbuat demikian, lebih kurang 24 hari kemudian selepas menerima pemakluman tersebut. Perayu-perayu tidak boleh aprobat dan reprobat, dalam perkara ini. Oleh demikian, maklum balas yang lambat perayu-perayu terhadap perlantikan yang salah tersebut, telah menyumbang kepada kelewatan pada mulanya (lihat perenggan-perenggan 26–27).

(3) Kelewatan di pihak responden dalam membuat permohonan untuk lanjutan masa hanya salah satu faktor yang perlu dipertimbangkan. Terdapat dimensi tambahan berhubung kesukaran yang tidak wajar, yang perlu dipertimbangkan, yang bermaksud kesukaran yang lebih daripada yang diwarankan oleh keadaan, atau kesukaran yang lebih daripada ketidakadilan, yang pemohon patut tanggung. Kelewatan tujuh bulan dalam pemfailan permohonan untuk lanjutan tersebut dan apa-apa kejadian yang prejudis yang dialami oleh perayu-perayu melebihi kesukaran yang tidak wajar yang akan dialami oleh responden jika permohonan untuk lanjutan masa tersebut tidak dibenarkan. Dengan menghalang tuntutan responden, ia akan secara berkesan, melepaskan perayu-perayu daripada apa-apa liabiliti, dan akan menyebabkan kesukaran yang tidak wajar terhadap responden (lihat perenggan-perenggan 35, 37).]

Notes

For cases on appointment of arbitrator, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1150–1157.

Cases referred to

Liberian Shipping Corp 'Pegasus' v A King & Sons Ltd [1967] 1 All ER 934 (refd)
Majlis Perbandaran Petaling Jaya v JF Industrial Products & Supplies Sdn Bhd [1998] 1 MLJ 441 (refd)
Safety Insurance Company Sdn Bhd v Chow Soon Tat [1975] 1 MLJ 193 (refd)

Legislation referred to

Arbitration Act 1952 s 28

Lim Pit Kong (PK Lim & Co) for the appellant.
Cecilia Hwang (Vincent Wong & Co) for the respondent.

PS Gill JCA (delivering judgment of the court):

[1] In this matter before us an application was filed by the respondent in the court below, and for clarity the pertinent prayers of the application read as follows:

MALAYSIA

IN THE HIGH COURT IN SABAH AND SARAWAK AT KOTA KINABALU

ORIGINATING SUMMONS NO K24–113 of 1998

IN THE MATTER OF THE settlement Agreement dated the 30th October 1997 entered between the Plaintiffs and the Defendants.

IN THE MATTER of Sections 3, 12 and 28 of the Arbitration Act 1952

BETWEEN

KEN GROUTING SYSTEM SPECIALIST SDN BHD

(Company No 89662-D) ... Plaintiffs

AND

(1) MASCOM (M) SDN BHD

(Co No 78789-A) ... 1st Defendant

(2) KAMAWANG ENTERPRISE SDN BHD

(Co No 152345-H) ... 2nd Defendant

(3) SERI PAGI SDN BHD

(Co No 061242-W)

(all trading under the same and style of SMK Engineering ... 3rd Defendant

AMENDED ORIGINATING SUMMONS

(Order 28 Rule 1 & 2)

(a) Mr Hoe Peng Khoon of Messrs Yusop & Hoe Associates be appointed as the Arbitrator to decide on the disputed expenses pursuant to clause 6(d) of the Settlement Agreement dated 30th October 1997 and that the arbitration be completed within 75 days from the date of the Order;

(b) Further or in the alternative, that extension of time be granted to the Plaintiffs for the appointment of the Arbitrator and for the decision of the Arbitrator to be handed down within 75 days from the date of the Order.

(c) ...

[2] Affidavits were filed in support and in resistance to the said application and eventually the application was allowed by the learned trial judge. An appeal was lodged against the said decision of the trial judge.

[3] What can be culled from the affidavits is that by a letter dated 29 March 1997, the appellants were awarded a project by the Government of Malaysia for the construction and completion of Package B, Kg Tamu Kayul of Klias Kecil (14km stretch) hereinafter referred to as the said 'project' under the Beaufort-Menumbok-Mempakul Road Project in Sabah, Malaysia.

[4] Pursuant to a joint-venture agreement dated 28 May 1997, and a supplementary agreement dated 8 July 1997, the respondent and appellants agreed to carry out and complete the said project on the terms specified in the said agreement.

[5] The respondent it was stated was responsible for financing the execution and implementation of the said project.

[6] Differences, however, arose in October 1997 between the appellants and the respondent culminating in termination notices issued by the appellants to the respondent. A period of good sense, however prevailed, as both parties then decided to negotiate on their differences and find a common ground. This resulted in a settlement agreement being drafted by both the parties on 30 October 1997.

[7] Essentially, by the terms of the settlement agreement, the appellants agreed to repay the respondent actual expenses as proved and substantiated plus reimbursement of actual expenses on specific items, and the payment of holding costs in the form of interest, and for hire of leasing charges in connection with the implementation of the project.

[8] We reproduce the settlement agreement for convenience:

SETTLEMENT AGREEMENT

this Agreement is made the 30th day of October 1997 Between KEN GROUTING SYSTEM SPECIALIST SDN BHD (Company No 89662-D) a company incorporated in Malaysia with its registered address at No 6, Jalan Datuk Sulaiman, Taman Tun Dr Ismail, 60000 Kuala Lumpur (hereinafter referred to as 'KEN') OF THE ONE PART AND SMK ENGINEERING (Licence No E924770) a firm registered under the laws of Malaysia (a partnership comprising (1) Mascom (M) Sdn Bhd (Company No 78789-A), (2) Kamawang Enterprise Sdn Bhd (Company No 152345-H) and (3) Seri Pagi Sdn Bhd (Company No 061242-W) with its place of business at Lot 48, No 13, 3rd Floor, Block F, Asia City, Kota Kinabalu, Sabah (hereinafter referred to as 'SMKE') of the other part.

RECITALS

1 **WHEREAS SMKE** had been awarded a project called 'The Construction and Completion of Beaufort-Menumbok-Mempakul Road, Sabah, Malaysia — Package B-Kg Tamu Kayul to Kg Klias Kecil (14 Km stretch)' (hereinafter referred to as 'the said Project') by the Government of Malaysia pursuant to a letter of Award dated 29th March 1997.

2 **AND WHEREAS** by a Joint-Venture Agreement dated 28th May 1997 and a Supplementary Agreement dated 8th July 1997 (hereinafter collectively referred to as 'the said JV Agreements'), SMKE and KEN agreed to carry out and complete the said project in accordance with the terms and conditions of the said JV Agreements.

3 **AND WHEREAS** disputes and differences have arisen between SMKE and KEN and SMKE had issued two (2) Termination Notices of the said JV Agreements to KEN both dated 1st October 1997, the validity of which is being disputed by KEN.

4 **AND WHEREAS** KEN had taken out an Originating Summons No K24-179 of 1997 in the High Court of Sabah and Sarawak at Kota Kinabalu and had obtained two Orders dated 11th October 1997 and 17th October 1997.

5 **AND WHEREAS** both SMKE and KEN are desirous of resolving their disputes and differences amicably by a mutual termination of the said JV Agreements upon the terms and conditions hereinafter set out.

NOW THIS AGREEMENT WITNESSETH as follows:

1 In consideration of SMKE and KEN amicably resolving their disputes and differences which have arisen, the parties hereby agree to a mutual termination of the said Joint-Venture Agreements upon the terms and conditions hereinafter set out.

2 KEN shall immediately upon the execution of this Settlement Agreement apply to discontinue the Originating Summons No K24-179 of 1997 against SMKE and the other Defendants therein and shall withdraw the Orders of Court dated 11th October 1997 and 17th October 1997 as soon as possible with each party to bear its own costs. SMKE shall discontinue the Appeal to the Court of Appeal in this matter immediately upon execution of this Settlement Agreement with each party to bear its own costs. The parties hereto shall also discontinue the arbitration proceedings which have already commenced and the costs already paid to the Regional Arbitration Centre, Kuala Lumpur by KEN shall be borne by each party in equal share.

3 KEN and SMKE mutually agree to withdraw the Notice to refer the disputes and differences which have arisen between them to Arbitration forthwith with each party paying its own costs.

4 SMKE undertake to procure the release and return of, the Performance Bond arranged or provided by KEN in accordance with the said JV Agreements for the said Project and to replace the said Performance Bond within thirty (30) days from the date of this Settlement Agreement. In the event that the Government shall for whatsoever reasons demand or call on the said Performance Bond cannot be released by the Government within thirty (30) days from the date of this Settlement Agreement or at all, SMKE shall cause to be issued an unconditional, irrevocable and on-demand bank guarantee (subject to the express term herein stated) in favour of KEN or upon request by KEN cause to be issued the said bank guarantee in favour of a nominee of KEN for the equivalent amount of the said Performance Bond immediately upon the expiration of the thirty (30) days from the date of this Settlement Agreement and it shall be an express term of the said bank guarantee that the same shall only be demanded or called on by KEN or its nominee (as the case maybe) in the event that the Government shall demand or call on the said Performance Bond. The bank guarantee shall remain in full force and enforceable for the entire period of the Performance Bond including any extension period as and when requested and until the said Performance Bond is discharged by the Government. A personal guarantee and indemnity shall be given by (1) Lawrence Sinsua (2) Haji Mohd. Kamaruddin Yap and (3) Mohamed Zainuddin bin Datu Pg Abdullah @ Kahar to jointly and severally, guarantee the due performance by SMKE of all its obligations liabilities undertakings and agreements under this Clause pursuant to the terms and conditions thereinstated simultaneously with the execution of this Settlement Agreement.

5 Simultaneously upon the execution of this Settlement Agreement, SMKE shall deposit with KEN an irrevocable and unconditional bank guarantee for the sum of RM750,000.00 payable FOURTEEN (14) days from the date of this Agreement.

6 (a) SMKE shall pay to KEN the actual expense, which are to be proved or substantiated with invoices where possible and practicable incurred by KEN for the purposes of the execution and implementation of the said Project.

(b) Without prejudice to the generality of (a) above, SMKE agrees to reimburse KEN for the actual expense incurred for the following and to take over the same;

(i) all three (3) vehicles assigned to the said Project;

(ii) construction of and the site office and laboratory;

(iii) rental of and the houses for the staff and consultants and land for the site office and laboratory taken on lease or rent;

(iv) all software, equipment, instruments, furniture, stationery for the consultants and the site office.

(v) Materials on site such as geotextiles and vertical drains and their containers;

(vi) Workers quarters;

(vii) Expenses incurred for Performance Bond and Workmen Compensation and Contractors' all risks insurance from the date of issuance upto the date of cancellation of the same;

(viii) Costs of employing Sub-Contractors;

(ix) Mobilization and demobilization costs in respect of equipment/ machinery for the said Project already delivered to the Project site and which are agreed to be taken back by KEN;

(x) Other expenses not listed above but which are directly attributable to the execution and implementation of the said Project.

(c) For the avoidance of doubt the term "actual expense" shall be deemed to mean the actual costs incurred by KEN as mentioned in sub-clauses 6(a) and (b) above according to the invoices supplied by KEN, or in the event that SMKE shall dispute the same, at commercial rates to be mutually agreed by the parties.

(d) Further to sub-clause 6(c) hereinabove, in the event that KEN and SMKE are unable to agree on 'actual expense' for any item or items, the said dispute or difference shall forthwith be referred to a quantity surveyor to be appointed by the President for the time being of the Institute of Quantity Surveyors Malaysia, in accordance with Clause 10.

7 SMKE shall also pay to KEN the holding cost in the form of interest and/or hire and/or leasing charges in connection with its financing of the said project. The holding cost in respect of interest shall be computed based on 2% above the BLR of Malayan Banking Bhd, Malaysia as at the date of settlement of the same and such interests are to be calculated from the date or dates when KEN had actually paid the expense or expenses or part thereof till the time of full settlement of the same by SMKE. Hire and/or leasing charges shall be those charges incurred and paid by KEN.

8 KEN shall forward to SMKE copies of all invoices, bank statements, advices etc to substantiate its claims wherever possible and/or practicable within three (3) days from the date of this Agreement.

9 Within ten (10) days from the receipt of the said invoices, bank statements, advices etc referred to in Clause 8 above, SMKE shall notify KEN of the expense or expenses which are agreed or disputed subject always that before SMKE dispute any expense or expenses SMKE shall have exercised all reasonable means to verify the said expense or expenses and shall at the same time provide proof of such exercise to verify the expense or expenses.

10 Any disputed expense or expenses shall be referred forthwith by either party to a quantity surveyor to be appointed by the President for the time being of the Institute of Quantity Surveyors whose decision shall be final and binding on all parties hereto. There shall be no appeal whatsoever against the decision of the said

Quantity Surveyor. The decision of the said Quantity Surveyor shall be handed down within seventy five (75) days from the date of this Agreement. If the President fails to appoint a Quantity Surveyor or if the said Quantity Surveyor is unable to decide on any expense or expenses, then the dispute or disputes or the one that the said Quantity Surveyor is unable to decide on (as the case maybe) shall be referred to a firm of independent accountants to be appointed by the President for the time being of the Malayan Institute of Accountants, Kuala Lumpur, upon the same terms and conditions aforesaid. The costs of the appointment of such Quantity Surveyor and/or firm of accountants as the case maybe shall be borne by the parties hereto in equal share.

11 SMKE shall pay KEN the actual expense and the holding cost incurred by KEN for the said Project within seventy five (75) days from the date of this Agreement PROVIDED ALWAYS KEN shall always be able to call on the bank guarantee referred to at Clause 5 above immediately after fourteen (14) days from the date of this Agreement and utilize the proceeds thereof as part payment towards payment of the actual expenses and holding cost incurred by KEN.

12 The parties hereto expressly agree that notwithstanding the Order of Court dated 11th October 1997 and/or 17th October 1997 that forthwith upon the execution of this Agreement and upon the compliance by SMKE of the terms herein, KEN shall forthwith commence to hand over to SMKE the Project site in an orderly manner with joint inspection and/or measurements of works completed and materials delivered up to the date of this Agreement duly conducted by representatives of both parties and shall further allow SMKE, its servants or agents to immediately take possession of the Project site and commence and carry out the said Project without any obstruction and interference by KEN.

13 Notwithstanding anything to the contrary herein contained KEN shall remove all its equipment machinery materials etc (not mentioned in sub-clause 6(b) above) which are now on the Project site within fourteen (14) days from the date of this Agreement.

14 For the avoidance of doubt, the parties hereto agree that save for the terms of this Settlement Agreement, neither party shall have any claims or further claims whatsoever against the other under the said JV Agreements and that KEN shall not have any interest in the said Project or the Contract Sum (as defined in the said JV Agreements) or any variation thereto or any part thereof.

15 Each party shall bear its own legal costs in respect of the preparation, finalization and execution of its Agreement and the stamp duty payable for this Agreement shall be borne by the parties in equal share.

16 Time whenever mentioned in the Settlement Agreement shall be of the essence.

17 In the event that a party hereto is in breach of the Settlement Agreement and as a result thereof the other party has to commence legal proceedings, then in any such event the defaulting party shall pay the innocent party its legal costs on full indemnity basis.

18 SMKE shall not until this Settlement Agreement has been fully performed dissolve reconstruct or reorganize the partnership and without prejudice to the foregoing, if any of the foregoing events occur, this Settlement Agreement shall continue to bind SMKE and all the partners thereof. For avoidance of any doubt, this Settlement Agreement shall continue to bind SMKE and its partners notwithstanding any of the partner is wound-up liquidated or insolvent.

19 Until the full performance of this Settlement Agreement, SMKE shall ensure that the main contract between the Government and SMKE shall not be terminated for whatsoever reason.

[9] From the record of proceedings, we note that disputes arose once again on 14 November 1997 between the appellants and respondent in respect of certain expenses incurred by the respondent. This resulted in the respondent writing to the President, of the Institute of Quantity Surveyors on 27 November 1997 at the request of the appellants for the appointment of an independent Quantity Surveyor.

[10] The Institute of Quantity Surveyors replied on 3 December 1997, and the letter bears reproduction:

INSTITUTE OF SURVEYORS,

MALAYSIA

3rd Floor, Bangunan Jurukur, 64-66,

Jalan 52/4, 46200 Petaling Jaya

Selangor, Malaysia

P.O. Box 171, 40720 Petaling Jaya

Selangor, Malaysia

Tel: 03-7551773, 03-7569728, 03-7550253

Fax: 6(03)-7550253 E-mail: ism@po.jaring.rnv

President: Encik Chua Siow Leng

Secretary General: Puan Wan Maimun Wan Abdullah

3 December 1997

Mr KC Tang

Director, Finance & Administration

KEN GROUTING SYSTEM SPECIALIST SDN BHD

No 6, Jalan Datuk Sulaiman

Taman Tun Dr Ismail

60000 Kuala Lumpur

Fax: 7188246 FAX/MAIL

Dear Mr Tang,

RE: SETTLEMENT AGREEMENT BETWEEN KEN GROUTING SYSTEM SPECIALIST SDN BHD AND SMK ENGINEERING

Thank you for your letter of 27th November 1997.

We hereby nominate the following name to be appointed as the Independent Consultant QS for the above project

A Name: Pakatan Ukur Bahan

(Jurukur Bahan & Perunding Kos Binaan)

Address: 918, Lorong Pulau Pinang, Taman Melawati, 53100 Kuala Lumpur

Telephone: 03-4070569

B Fax: 03-4073299

Thank you.

Yours faithfully.

C INSTITUTION OF SURVEYORS, MALAYSIA

Sgd: xxx

Dr Abdul Ghani Khalid

Chairman QS Sectional Committee

D **[11]** Worthy of note, judging by the said letter is that, the appointment of the Quantity Surveyor, was not done by the said President of the Institute of Surveyors, as per cl 10 of the settlement agreement, but by the Chairman of the Quantity Surveyor Sectional Committee.

E **[12]** Two letters emanated from the office of the respondent thereafter to the appellants in regard to the said appointment, and how expenses were to be borne. Thereafter, on 12 December 1997, the solicitors of the respondent wrote to the appellants' solicitors requesting a meeting to resolve the disputed issues amicably.

F **[13]** On 2 January 1998, a letter was received from the appellants' solicitors which basically disagreed with the appointment of Messrs Pakatan Ukur Bahan, as the said surveyors were not appointed by the President of the Institute of Quantity Surveyors.

PK LIM & CO

Advocates & Solicitors

G Peguambela dan Peguamcara

Your Ref: CL/039-97/KGSS/CL/spk

Our Ref: PKL/G1/1256/O1/b

02 January 1998

H Messrs Colin Lau & Co

Advocates & Solicitors

Shop No 6, Blok A, 2nd Floor

Ruang Singgah Mata 1

I 88000 KOTA KINABALU

Sabah

Dear Sirs,

ORIGINATING SUMMONS NO K24-179 of 1997

KEN GROUTING SYSTEM SPECIALIST SDN BHD

vs

SMK ENGINEERING (Sued as a firm)

MASCOM (M) SDN BHD

SERI PAGI SDN BHD

KAMAWANG ENTERPRISE SDN BHD

[The 2nd, 3rd and 4th Defendants trading under the name of

the 1st Defendant (a firm)

We act for Messrs SMK Engineering in place of Messrs Raj & Co in the matter of the Settlement Agreement dated 30 October 1997.

In response to your letter dated 12 December 1997 addressed to Messrs Raj & Co, our client's instructions are that they are not agreeable to refer the disputed expenses to be adjudicated by Messrs Pakatan Ukur Bahan on the ground that this firm of Quantity Surveyors was not nominated by the President for the time being of the Institute of Quantity Surveyors in breach of clause 10 of the Settlement Agreement.

Apart from the above objection, our client reserves all their rights under the said Settlement Agreement.

Our client prefers that the appointment of the Quantity Surveyors be settled before they give any reply to your client's proposal as contained in your letter to Messrs Raj & Co dated 12 December 1997 under reference herein.

Yours faithfully,

Sgd: xxx

cc: Client

[14] Confronted by this, the respondent then wrote on 7 January 1998 directly to the President of the Institute of Surveyors Malaysia, requesting his assistance in the appointment of a quantity surveyor.

[15] On 10 January 1998, a favourable reply was received by the respondent from the President of the Institute of Surveyors, nominating Mr Hoe Peng Khoon as the Independent Consulting Quantity Surveyor.

[16] A lull took place thereafter, in terms of correspondence between the parties, and matters were only reactivated on 13 June 1998, when the solicitors for the respondent wrote to inform the appellants of the appointment of MrHoe Peng Khoon as the independent consultant Quantity Surveyor, together with the stated fees and holding costs.

[17] On 3 July 1998, the appellants replied through their solicitors, disputing

the claims of the respondent and informing them that they were prepared to accept court process.

[18] We pause to note here, that it is patently clear from the chronology of events and dates that the respondent was in default of the stipulation of time in respect of the said settlement agreement, more particularly cll 10 and 16.

[19] Mindful of this lapse in respect of cl 10 particularly, the respondent then filed the present application for extension of time pursuant to s 28 of the Arbitration Act 1952. Section 28 of the Arbitration Act 1952 provides as follows:

> Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given, or an arbitrator is appointed, or some other step to commence arbitration proceedings is taken, within a time fixed by the agreement and a dispute arises to which the agreement applies, the High Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to any written law limiting the time for the commencement of arbitration proceedings, extend the time for such period as it thinks proper.

[20] It is clear from a reading of the abovementioned provision, and we agree with the interpretation of the said section by the High Court judge, that the High Court is given a discretion to extend the time which has expired depending on whether in the circumstances of any particular case undue hardship would be caused if the extension is not given.

[21] A plethora of authorities were cited by the counsels for and against the extension. On our part, we have given serious deliberation on this matter, and are of the considered view, that each application for extension would invariably depend on its particular facts, before the court can exercise its discretion whether to extend time to refer to arbitration, in a situation where time has lapsed.

[22] In the cases cited, we find that the case of *Majlis Perbandaran Petaling Jaya v JF Industrial Products & Supplies Sdn Bhd* [1998] 1 MLJ 441 best encapsulates the law in respect of s 28 of Arbitration Act 1952.

[23] Reverting to the present matrix, from the chronology of events read in conjunction with the settlement agreement, the respondent had, we observe acted swiftly in regard to the appointment of a quantity surveyor, for on 3December 1997, the Chairman of the Quantity Surveyor Sectional Committee of the Institute of Quantity Surveyors Malaysia wrote and stated, albeit erroneously, that Pakatan Ukur Bahan had been appointed as the independent quantity surveyor. We interject to say that the only chink we find at this stage was that the respondent in detecting the erroneous appointment, should have taken steps to remedy it, posthaste.

[24] No response to the said appointment was made by the appellants despite several letters being sent to their solicitors notifying them of the appointment and payment of fees towards the said appointment.

[25] It was only on 2 January 1998, did the appellants condescend to reply, wherein they brought the attention of the respondent to the fact that the appointment of the independent quantity surveyor was flawed. **A**

[26] This letter intimating the erroneous appointment of the independent quantity surveyor was only sent to the respondent some 24 days after receiving the respondent's letter of notification of the independent quantity surveyor. It is our considered view that if the appellants had taken umbrage on the appointment of the said independent quantity surveyor, they should have taken expeditious steps to notify the respondent about the erroneous appointment. To take a supine position for 24 days, and then to insist on strict adherence of the time limit, imposed in cl 10, is with respect, unjust. **B** **C**

[27] We are, however, mindful of the submissions of the appellants that it was not required of them to bring to the attention of the respondent the erroneous appointment of Messrs Pakatan Ukur Bahan. However, they did so eventually, some 24 days later after receipt of the notification. The appellants cannot with respect, approbate and reprobate, in this manner. To that end, we find that the late response of the appellants to the erroneous appointment, did contribute to the initial delay. **D**

[28] On receipt of the letter of 2 January from the appellants, the respondent had on 7 January 1998 written once again to the Institute of Quantity Surveyors requesting for the appointment of an independent Consultant by the President of the Institute who on 10 January 1998, gave a favourable reply. **E**

[29] From our observations, by the time this letter of the respondent was received by the Institute, and replied to by the Institute, the time frame as envisaged by cl 10 of the settlement agreement was drawing to a close.

[30] From that date onwards it took a further six months on the part of the respondent to inform the appellants of the fresh appointment, to which the appellants' solicitors informed the respondent, that they were prepared to accept court process on this matter. It is this retort, we feel, that must have prompted the respondent to file the application for an extension of time, some nine months after the expiry of cl 10 of the settlement agreement. **F**

[31] We wish to state at this juncture that we find the delay and reasons proffered by the respondent for it somewhat disquieting. The respondent should have, we feel, acted with alacrity in respect of their claim. But, as we will state later, delay is not the only issue one considers when adjudicating on such an application. **G**

[32] In fashioning their arguments, counsel for the respondent submitted that any decision not in favour of them would rid the appellants of their liability, and that the respondent would suffer undue hardship, as they would have lost their claim of about RM1m. We find this aspect unrebutted in the affidavits of the appellants. **H**

[33] In reaching our eventual findings, we examined the cases on this issue, and their ethos, on the question of extension of time. The case of *Liberian Shipping Corp 'Pegasus' v A King & Sons Ltd* [1967] 1 All ER 934 which was **I**

referred to in *Safety Insurance Company Sdn Bhd v Chow Soon Tat* [1975] 1 MLJ 193, by Mohamed Azmi J (as he then was) stated (at pp 194–195):

> In construing s 28, it is relevant to refer to the case of *Liberian Shipping Corp v A King & Sons Ltd* in which s 27 of the English Arbitration Act 1950, which is in *pari materia* with our s 28, was considered by the Court of Appeal in England. In that case, it was held that an extension of time for arbitration may be granted under s 27 even though the claimant himself is at fault. On the question of 'undue hardship', Denning LJ said at p 938:
>
> > 'It does appear that in the past the courts have been inclined to emphasize the word "undue" and to say that if a man does not read the contract and is a day or two late, it is a "hardship"; but it is not an "undue hardship", because it is his own fault. I cannot accept this narrow interpretation of the statute. These time limit clauses used to operate most unjustly. Claimants used to find their claims barred when, by some oversight, they were only a day or two late. In order to avoid that injustice, the legislature intervened so as to enable the courts to extend the time whenever "in the circumstances of the case undue hardship would otherwise be caused". "Undue" there simply means excessive. It means greater hardship than the circumstances warrant. Even though a claimant has been at fault himself, it is an undue hardship on him if the consequences area out of proportion to his fault.'
>
> At p 940, Salmon LJ in his judgment said:
>
> > 'That section seems to me to state quite plainly that if, having considered all the circumstances of the case, the court comes to the conclusion that the hardship imposed by the form of the arbitration clause on the claimant is greater than that which, in justice, he should be called on to bear, the time within which to appoint an arbitrator may be extended by the court. I do not believe that the courts are entitled to read words into this section which are not there and which would have the effect of cutting down the power given to the courts by the plain language of the section itself.'
>
> In construing whether the court should exercise its power under s 27, Salmon LJ at p 943 gave the following guidelines:'
>
> > 'I am not prepared to hold that the court's power under the section should be very rarely exercised. Still less that they should be exercised freely. The question whether those powers should or should not be exercised must turn exclusively on the particular facts of each case in which the question arises.
> >
> > In considering this question, the court must take all the relevant circumstances of the case into account: the degree, of blameworthiness of the claimants in falling to appoint an arbitrator within the time; the amount at stake, the length of the delay; whether the claimants have been misled, whether through some circumstances beyond their control it was impossible for them to appoint an arbitrator in time. In the last two circumstances which I have mentioned, which do not arise here, it is obvious that normally the power would be exercised, but those are not the only circumstances and they are not, to my mind, necessary circumstances for the exercise of the power to extend time. I do not intend to catalogue the circumstances to be taken into account, but one very important circumstance is whether there is any possibility of the other side having been prejudiced by the delay.'

[34] The Federal Court in the penultimate paragraph of the case of *Safety Insurance Company Sdn Bhd v Chow Soon Tat* stated (per Gill CJ (Malaya) at p 202):

The main issue in this appeal is whether the court below exercised its judicial discretion correctly on the facts before it. It is contended for the appellants that in the circumstances of the present case there cannot be a finding of undue hardship within its definition in the case law. I do not agree. It is true that there was inordinate delay on the part of the respondent in making the application for extension of time, but that is not the only factor to be considered. The latest pronouncement on the difficult question of undue hardship, by a majority decision of the English Court of Appeal in *Liberian Shipping Corp v A King & Sons Ltd* is that undue hardship merely means greater hardship than the circumstances warrant or hardship greater than that which, in justice, the claimant should be called upon to bear. That the learned trial judge took all the relevant considerations into account in the exercise of his discretion to grant extension of time is abundantly clear from his grounds of judgment, and I can find nothing wrong in the way in which he dealt with the application and in the conclusions to which he arrived.

[35] It is plain from the pronouncement of these cases, that the delay on the part of the respondent in making the application for extension of time is only one of the factors that needs to be considered. There is the added dimension of undue hardship, that one must consider, which means greater hardship than the circumstances warrant, or hardship greater than that which in justice, the applicant should be called upon to bear.

[36] The learned trial judge gave critical consideration in his judgment to the issue of undue hardship that the respondent would bear, as against the prejudice the appellants would suffer, as a consequence to the granting of the extension of time. We believe he took into account of all relevant matters, when exercising his discretion. His judgment on this aspect merits reproduction:

However, in spite of such delay, I did not find that the defendants were unduly prejudiced. Instead, it was my view that greater hardship than the circumstances warrant or hardship greater than that which in justice the plaintiffs would be called upon to bear if the extension was not granted. And that is why I stated in my extempore judgment that the provision of the condition should negate any prejudice that may arise upon the defendants. In fact when learned counsel for the defendants made the alternative submission I was under the impression that the provision of such a condition would have satisfied any apprehension of prejudice on the part of the defendants. Not that such a submission no longer required me to exercise my discretion on my own. Rather, it was a factor that I took into account in exercising my discretion. But at all times in considering whether or not to exercise my discretion the paramount consideration I had in mind was on the question of hardship that would be occasioned upon the plaintiffs if the extension was not granted. At the same time, I also took into consideration the probability of hardship upon the defendants if the extension was granted. And indeed learned counsel for the defendants only gave the incidence of prejudice to his clients in his way.

'The defendants will be prejudiced by having to pay holding costs in accordance with cl 7 of the settlement agreement.

Any extension of time, if granted, will not only prejudice the defendants in terms of holding costs but also amount to re-writing cl 10 of the agreement for the plaintiffs as cl 16 thereof clearly stipulates that time is of essence.

The defendants have vested right to insist on strict compliance with cl 16.'

With the condition as given, I do not think the defendants would still be exposed to the prejudice as averred.

[37] We share the trial judge's sentiments that the delay of seven months in filing the application for extension and any incidence of prejudice suffered by the appellants is far outweighed by the undue hardship that the respondent will suffer if the application for extension of time is not granted. By barring the respondent's claim, it would effectively, we feel, absolve the appellants of any liability, and would cause this respondent undue hardship.

[38] For these reasons, we dismissed the appeal. Each party is to bear its own costs. Deposit to be refunded to the appellants.

Appeal dismissed.

Reported by Sally Kee Seok Meng